

**BOARD OF ZONING APPEALS
MINUTES
APRIL 27, 2004**

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas was held at 1:30 p.m., on April 27, 2004, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance:

JAMES RUANE, JAMES SKELTON, DWIGHT GREENLEE, and BICKLEY FOSTER.

The following Board members were absent:

ERMA MARKHAM, RANDY PHILLIPS, and JOHN ROGERS.

SHARON DICKGRAFE – Law Department present.

HERB SHANER - Office of Central Inspection present.

The following Planning Department staff members were present:

DALE MILLER Secretary.

SCOTT KNEBEL Assistant Secretary.

ROSE SIMMERING, Recording Secretary.

RUANE Item #1, March 23, 2004, BZA meeting minutes.

GREENLEE moves, SKELTON seconds to approve March 23, 2004, BZA meeting minutes.

Motion carries 4-0.

RUANE Item 2, Case No, BZA2004-22, Request a Variance to increase the permitted size of a building sign from 68 square feet to 264 square feet on property zoned “GO” General Office, generally located north of Central and east of Socora. Applicant, Genesis Health Clubs, %Rodney Steven, and Agent, Ferris Consulting, %Greg Ferris.

KNEBEL, Planning staff Presents staff report and slides. Staff recommends approval, subject to conditions, in the following staff report.

SECRETARY’S REPORT

CASE NUMBER:	BZA2004-00022
OWNER/APPLICANT:	Genesis Health Clubs c/o Rodney Steven
AGENT:	Ferris Consulting c/o Greg Ferris
REQUEST:	Variance to increase the maximum square footage of a building sign from 68 square feet to 264 square feet.
CURRENT ZONING:	“GO” General Office
SITE SIZE:	7.17 Acres
LOCATION:	North of Central and east of Socora (854 N. Socora)

JURISTITION: The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five conditions, as required by State Statutes, are found to exist.

BACKGROUND: The Board granted sign variances (BZA2000-00001) for the subject property on March 28, 2000. One variance allowed a building sign with a maximum square footage of 68 square feet, which the applicant installed on the building. The applicant recently requested a sign permit to replace the 68 square-foot building sign with a 264 square-foot building sign. The request for the sign permit was denied because the proposed building sign exceeded the size permitted by the variance. The applicant subsequently installed the 264 square-foot building without a permit, and the existing “Genesis Health Clubs” sign on the building (see attached photograph) is illegal. Therefore, the applicant has requested a variance to allow the illegally-installed sign to remain and has submitted the attached letter dated March 20, 2004, that addresses how the request meets the criteria for granting a variance.

The facility currently has two directional signs. One is located on Central and the other is located on Socora. Even with these two signs, it is somewhat difficult to locate the correct building due to the fitness center’s location and the proximity of the other office buildings located adjacent to the site.

The surrounding uses are mixed in nature and include residential, institutional, and office uses on property zoned “SF-5” and “GO”. The uses facing the side of the building on which the sign is located are all non-residential. The residences are located on the rear and side of the fitness center and are not be able to see the sign.

ADJACENT ZONING AND LAND USE:

NORTH	“SF-5”	Single-family residential
SOUTH	“GO”	Medical offices
EAST	“SF-5”	Single-family residential
WEST	“SF-5”	Church

UNIQUENESS: It is the opinion of staff that this property is unique, inasmuch as the property is located off of the major roadway and is positioned behind other buildings which shield the fitness center. Further this use was formerly associated with Via Christi which has offices on Central, providing an identity for the fitness center on Central. Now that the fitness center is not part of Via Christi, the fitness center is in a somewhat unique location, hidden by Via Christi’s offices.

ADJACENT PROPERTY: It is the opinion of staff that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as adjacent properties are constructed with similar office type buildings or are residential uses which cannot see the proposed signage.

HARDSHIP: It is the opinion of staff that the strict application of the provisions of the sign regulations will constitute an unnecessary hardship upon the applicant, inasmuch as the facility is not readily identified from Central. There are other buildings in the area of similar scale and appearance. The fitness center is located behind these other buildings. Additional signage would make it easier to locate the fitness center.

PUBLIC INTEREST: It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as the signage is tasteful in design, is of an appropriate scale, and has minimal lighting.

SPIRIT AND INTENT: It is the opinion of staff that the granting of the variance requested would not oppose the general spirit and intent of the Sign Code inasmuch as the signage will make it easier for customers to locate the facility and reasonably balances the need for the sign with the preservation of the visual qualities of the community.

RECOMMENDATION: It is staff's opinion that the additional signage is appropriate for a building located on an interior lot that more than 900 feet away from Central. Should the Board determine that conditions necessary to the granting of the variance exist, then it is the recommendation of the Secretary that the variance to increase the maximum square footage of a building sign from 68 square feet to 264 square feet be GRANTED, subject to the following conditions:

1. Signage on the subject property shall conform with the Sign Code and variances granted by BZA Resolution No. 2000-00001, except that the 68 square-foot building sign permitted by BZA Resolution No. 2000-00001 shall be permitted to be a maximum of 264 square feet in area.
2. Within 30 days of the granting of the variance, the applicant shall obtain a permit from the Office of Central Inspection for the sign permitted by this variance, including paying a double permit fee as required by the Sign Code for failing to obtain the appropriate permit prior to installing the sign.
3. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.

RUANE Which sign company was it that made the application?

KNEBEL I don't know that I have that information. The applicant knows.

RUANE Who installed the sign?

KNEBEL The sign company installed it.

RUANE The same sign company that made application?

KNEBEL Right, that made application for the Sign Permit.

RUANE Would Genesis or its Agent have been informed or know that the original application was denied?

KNEBEL I don't know if they were informed or not.

RUANE In the denial process is there anything sent to them or does it all go to the sign company?

KNEBEL I think it just goes to the sign company, but I don't issue signs permits, so I am not familiar with the process as to whether or not it goes to the property owner as well.

RUANE Who issues the sign permit?

KNEBEL The Office of Central Inspection, and I am not familiar with their process enough to know whether they require, like the Planning Department does, name and address of owners of property in addition to just the sign company itself. I am not sure that they do.

RUANE Is there any notification given to adjoining property owners?

KNEBEL No, these are permits like building permits where you apply and if it is permitted then it is approved, and you are allowed to initiate. Kurt Schroeder is here, and he could probably tell us about the sign permitting process and whether or not there is notification to property owners or just to the sign contractor.

FOSTER What is the permit fee?

KNEBEL Less than the fee for this variance. A couple a hundred dollars at the doubled rate. It is in the Sign Code.

FOSTER It says if anybody does put up a sign without a permit, they pay a double permit fee.

KNEBEL It is \$25 plus \$6 per 10 square feet in increase in area, and then you would double that.

GREG FERRIS, Ferris Consulting, representing Genesis Health Club. The Sign Company was Shawn's Sign Service, Inc. Genesis hired Shawn's to do this assuming they would do it properly. Genesis does not get notification. The standard procedure getting a sign permit is you have to be a licensed sign contractor, which Shawn's is, so we hired what we thought was an appropriate agency to do this. They go down and make application. There's no requirement for the owner to be involved in that because supposedly since he is licensed he knows the rules and is suppose to follow those rules. So Genesis gets put into a precarious situation in that the sign that they thought they had purchased from Shawn's and Shawn's assured them was okay, was not okay, and therefore we got the cart before the horse.

Had we known the sign was not okay we would have come to BZA before the sign went up. Genesis had no knowledge that this sign was not legal when it was installed, and did not know until after it was installed, and was then notified by Central Inspection that they had a violation, because once the violation occurs, it occurs both by the sign company, and the owner of the property.

The fee will be \$160-170 and double to \$350-360. Genesis must assume some responsibility as they are the ones that hired Shawn's. We are not trying to duck that responsibility; however, we do believe that the staff's report is accurate and that we have met the requirement for a variance. Genesis is a good neighbor and we believe the sign is necessary because it is impossible to see Genesis from any of the streets, and if we had a 64 foot sign you wouldn't even be able to see it from Socora, much less trying to find the building.

SKELTON You did notify the property owners?

FERRIS Yes, we did for the variance. It was 200 feet notice area. If there had been a concern I think you would have heard it today.

RUANE Is anyone from Shawn's Sign Company here today?

FERRIS No there wouldn't have been. While they did make the screw up, our application is on behalf of Genesis, and I asked Shawn not to be here today. This is involving Genesis now.

RUANE It would be helpful to me if Shawn's was here. Is Shawn's Sign Service Inc. who Genesis contracts with normally?

FERRIS I wouldn't say that he has used them at all of them. He has used him before on many occasions and not had any problems with them.

RUANE Shawn's did assure Genesis that the permit had been issued?

FERRIS To Rodney's knowledge he knew that there was no issue. I don't know if Shawn called him and said I got the permit and I am putting up the sign. He did not notify him that there were any issues or any problems and was not made aware of that until Central Inspections called and said we have a problem and you need to fix it.

RUANE We really don't know whether or not Shawn's gave him that assurance?

FERRIS That is correct.

FOSTER Did Shawn's offer any explanation for this error?

FERRIS Shawn's said that he did talk to Central Inspection and that they had assured him that there wasn't any problem. Well, I do sign permits, and I know that you get the sign permit when you get it and pay for it, so that was where we began to have some disagreements on. In his mind he had gotten some verbal permission to do this, which there isn't anything in the Code that allows for verbal permissions on signs. That is why he and I did not see eye to eye.

RUANE Is there any indication that the denial was issued before the construction began?

FERRIS I don't know that the permit was ever denied. I have a copy of the permit, and the permit did not even adequately reflect what he constructed. There are some notes on the permit, but Central Inspection doesn't generally send out a notice that they denied your permit, they just don't give it to you. I have made applications that were not approved, but it wasn't that Central Inspection sent me a letter that said we are not going to approve it, they just told me that weren't going to approve it.

RUANE Thanks for letting us know that there is no document or denial sent. Procedurally, in terms of the sign application process, what do you do when a sign gets installed that shouldn't have, and what are the consequences or does the applicant bear the brunt of this?

KURT SCHROEDER, Central Inspection, The Sign Code gives us authority to do a couple of things. If something is put up without a permit being issued, we can automatically double the fee. Assuming they submit the application, it is appropriate, and they can put up the sign. It also gives us the authority to take someone to court on a misdemeanor offense, which we have done on a number of occasions when we have had a sign company that has done this on multiple occasions. So then they can have a criminal complaint issued against them, and then they can have a hearing in court and all that kind of thing.

RUANE Is there any act that signifies denial of an application?

SCHROEDER Generally there is, because what happens about 80% or more of our permits are faxed into us or mailed to us and we have a turn around time of getting something back to that person with a denial or something faxed back to them within 24 hours. Usually we write on the permit application if there are improvements that need made.

RUANE So that document would go back to Shawn's and Genesis could have no awareness of the denial?

SCHROEDER Yes, that is possible. If we have a sign pending that there are some things that need clarified on the site plan so we can respond to the application, we will call their people and make recommendations and get additional information.

RUANE Kurt what is Shawn's track record?

SCHROEDER I don't work with the sign people on a daily basis. I would probably have to get my staff here to really answer that.

RUANE To your knowledge, is this the first instance in which a sign has been erected without a permit?

SCHROEDER I kind of remember Shawn's name on a couple of others in the past but it has been a few years.

RUANE I have that same vague recollection.

SCHROEDER I would have to get with my staff and look at the permits to say that for sure. I don't want to mis-speak.

FERRIS Here is the copy of the permit that I would like to pass around, and at the bottom of it you have a for office use only, and it has application approve or denied, and if they denied it they must check this and send it back to you. This application has not been marked so that is why I don't think this has been denied. I think he put up the sign before he got it approved.

RUANE That is the application that was submitted and returned?

FERRIS It wasn't ever returned.

DICKGRAFE This is the one that you received not the one that Shawn may have filled out?

FERRIS This is the one that Shawn filled out, and then when we filed this case, I went to Central Inspection and asked them for copies of the application, and this is the copy that she pulled off of her desk, and this was her working copy.

SKELTON Between Genesis and Shawn's Company, I assume Genesis was in contract where Shawn's was going to supply all the signage and installation and everything?

FERRIS That is correct.

SKELTON So, it is possible that if he was worried about being left holding the bag if the variance wasn't approved on this expensive sign that is installed now, we can talk about it, but the same thing it sounds like he went ahead and put it up anyway.

RUANE Greg, please pass around that application.

FERRIS Sure. We believe as the applicant that we didn't do anything in violation other than hire a licensed contractor which we thought was not in violation and were not aware of any of the issues until after the fact of the sign being up.

FOSTER It is possible that if they had applied for a variance in the first place, they might well have received it would be my observation. I feel the sign is kind of large. It is over 380% larger than what is allowed. It still 900 feet back from the main road for people who would see it. The residential is in the back or either side of it, so they should not be bothered by it. So I don't see any reason to deny the variance. This is not a sale sign or a reader board. It is on a building.

SKELTON I concur with Bickley. It sounds like the contractor had the sign made, and if he was worried and was going to take a risk to come ask for a variance, because if we would have denied, he would have been left holding that sign and several thousands dollars worth of product there, and he would have had to eat it. So instead of doing that he went ahead and slapped it up and hoped nobody would notice, without any communication to the owner to the building it seems like.

RUANE Aren't you presuming that they build the sign first and then seek a permit?

SKELTON He could have followed the law from the get go, but he obviously made the sign. Why didn't he come to this Board and ask for a variance first then?

RUANE Because he was told not to.

SKELTON Who told him not to?

RUANE Today you mean?

SKELTON No, when they installed the sign.

RUANE Maybe I missed the point.

SKELTON I am saying it is possible that he didn't want to run that risk because it could have been denied and he knew he was in violation.

FOSTER Had they come to a variance anyway, I think it can be considered favorably and my point is that I ignore the fact that it is already up. It doesn't matter to me it is already up. The point is, had they come to us in the first place, I think it should be reviewed favorably.

RUANE I am struggling with this one. I think Shawn's Sign Service acted very irresponsibly, and if we don't give them consequences, then there isn't anybody else to do that job.

DICKGRAFE I think there are consequences. They can be taken to court if it is a continuing problem. We can revoke his license. We can file an injunction against the sign company if they are really, really screwing up, and this Board can do whatever they want to do, but I am not sure that this is this Board's role to sanction the sign company. Now, if the factors for the variance aren't met, then I think that is clearly within the Board jurisdiction, but there are other ways if Shawn's company is a repeat offender to deal with that.

RUANE This is a very dangerous precedence for us to set where we take all the teeth out of the Sign Code and Central Inspection's job which they do in examining these applications. First of all the 68 foot sign that was up was in and of itself a variance that we had allowed.

FOSTER From 32 feet to 68 feet plus the logo.

RUANE Which is double what is allowed and now their taking it to 264 square feet. Looking at the uniqueness and hardship and whether its met here because Genesis is a members only club, you may not use the facility unless you have paid your dues and you must know where it is. It is a destination rather than a impulse buy. Now if I was Genesis I would say that there are a lot of people that belong to our club that see our sign and impulsively pull in and work out. I suppose if I were not deprived of the opportunity of addressing Shawn's Sign Company myself, I would find it easier to cut Genesis lose.

FOSTER I would like to think that the staff would look into it, a black mark be put beside his name in the event that it happens again. I have had this before where people do these things, and they don't tell their clients, and it does put the client in a difficult situation. I still think if they had come in the very beginning for a sign like this it would have been approved big but given 900 feet back from the arterial street I think its okay.

DICKGRAFE From an historical standpoint, this has happened before. There were a couple of roof signs, Picadelly's West is the one that comes to mind, that either the permit wasn't pulled or it was denied. They built the sign, this Board went ahead and approved that sign, and there have been some that we have likewise denied. I don't think we have seen a floodgate of those types of cases coming before the Board, so this situation has come up in the past.

RUANE In those past occasions did we not hear from the business owner and the sign company applicant specifically with regard to the communication or mis-communication before the two of them?

DICKGRAFE I don't recall there being any in the Picadelly case. I think we heard from both the sign company and the applicant, but I don't remember there being any testimony as to what information was transferred between the two, and I am not sure how it would be relevant to the determination. Unless you are wanting to make some unclean hands analysis as far as the hardship goes, but I think again we have to look at the factors and what is or not established by the facts that are before the Board.

SKELTON I have been in the construction business for 13 years, I paint, and I have been around all kinds of different trades, and I have seen several things that contractors do something wrong, they screw up and try to cover themselves without telling the customer. It happens all the time. It is not our job to go out and investigate. This variance meets all five criteria furthermore I do believe that denying this variance would punish the customer for the screw up of the contractor.

RUANE I do agree with you that there are screw ups in all businesses and construction just being one of them, and when that happens I believe that the property owner is quite quick to point the finger and assess blame where it belongs.

SKELTON When it comes to technical aspects of meeting Code requirements, it is the contractor's responsibility just as an architecture's responsibility to make sure that is done for the customer because the customer is ignorant about that and how it applies to this case.

RUANE I personally know what a hands on manager Rodney is because of the unobservable amount of time that I spend in his club.

GREENLEE MOVES SKELTON SECONDS THAT THE BOARD ACCEPT THE FINDINGS OF FACT AS SET FORTH IN THE SECRETARY'S REPORT; AND THAT ALL FIVE CONDITIONS SET OUT IN SECTION 2.12.590(b) OF THE CITY CODE AS NECESSARY FOR THE GRANTING OF A VARIANCE HAVE BEEN FOUND TO EXIST AND THAT THE VARIANCE BE GRANTED SUBJECT TO THE CONDITIONS SET OUT THE SECRETARY'S REPORT.

RUANE I possess veto power today, and I trust my comments will be given to the Sign Company.

MOTION carries 4-0. The Board adopts the following resolution:

BZA RESOLUTION NO. 2004-00022

WHEREAS, Genesis Health Club c/o Rodney Steven (Owner); Ferris Consulting, c/o Greg Ferris; pursuant to Section 2.12.590.B, Code of the City of Wichita, request a variance to increase the maximum square footage of a building sign from 68 square feet to 264 square feet on property zoned "GO" General Office legally described as follows:

Lots 3, 4 and 5 and that part of Lot 1 beginning at the Southwest corner of Lot 3; thence east 197.54 feet; thence Northeast 214.01 feet along the Southeasterly line of Lot 5; thence East 171.21 feet; thence Southeast 119 feet; thence South 335.24 feet to a curve; thence along said curve 160.06 feet; thence west 425.44 feet; thence North 54 feet; thence East 11 feet; thence

North 141 feet; thence East 19 feet; thence North 31 feet; thence West 288.73 feet more or less to the West line; thence North 52.61 feet; thence East 119.99 feet; thence North 150 feet to beginning, Tyler Acres Sixth Addition, an Addition to Sedgwick County, Kansas. Generally located north of Central and east of Socora. (854 N. Socora)

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of April 27, 2004, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance arises from such condition which is unique. It is the opinion of the Board that this property is unique, inasmuch as the property is located off of the major roadway and is positioned behind other buildings which shield the fitness center. Further this use was formerly associated with Via Christi which has offices on Central, providing an identity for the fitness center on Central. Now that the fitness center is not part of Via Christi, the fitness center is in a somewhat unique location, hidden by Via Christi's offices.

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents. It is the opinion of the Board that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as adjacent properties are constructed with similar office type buildings or are residential uses which cannot see the proposed signage.

WHEREAS, the Board of Zoning Appeals has found that the strict application of the provisions of the zoning ordinance of which variance is requested will constitute unnecessary hardship upon the property owners represented in the application. It is the opinion of the Board that the strict application of the provisions of the sign regulations will constitute an unnecessary hardship upon the applicant, inasmuch as the facility is not readily identified from Central. There are other buildings in the area of similar scale and appearance. The fitness center is located behind these other buildings. Additional signage would make it easier to locate the fitness center.

WHEREAS, the Board of Zoning Appeals has found that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare. It is the opinion of the Board that the requested variance would not adversely affect the public interest, inasmuch as the signage is tasteful in design, is of an appropriate scale, and has minimal lighting.

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinance. It is the opinion of the Board that the granting of the variance requested would not oppose the general spirit and intent of the Sign Code inasmuch as the signage will make it easier for customers to locate the facility and reasonably balances the need for the sign with the preservation of the visual qualities of the community.

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals, pursuant to Section 2.12.590.B, Code of the City of Wichita, that a variance be granted to increase the maximum square footage of a building sign from 68 square feet to 264 square feet on property zoned “GO” General Office legally described as follows:

Lots 3, 4 and 5 and that part of Lot 1 beginning at the Southwest corner of Lot 3; thence east 197.54 feet; thence Northeast 214.01 feet along the Southeasterly line of Lot 5; thence East 171.21 feet; thence Southeast 119 feet; thence South 335.24 feet to a curve; thence along said curve 160.06 feet; thence west 425.44 feet; thence North 54 feet; thence East 11 feet; thence North 141 feet; thence East 19 feet; thence North 31 feet; thence West 288.73 feet more or less to the West line; thence North 52.61 feet; thence East 119.99 feet; thence North 150 feet to beginning, Tyler Acres Sixth Addition, an Addition to Sedgwick County, Kansas. Generally located north of Central and east of Socora. (854 N. Socora)

The variance is hereby GRANTED, subject to the following conditions:

1. Signage on the subject property shall conform with the Sign Code and variances granted by BZA Resolution No. 2000-00001, except that the 68 square-foot building sign permitted by BZA Resolution No. 2000-00001 shall be permitted to be a maximum of 264 square feet in area.
2. Within 30 days of the granting of the variance, the applicant shall obtain a permit from the Office of Central Inspection for the sign permitted by this variance, including paying a double permit fee as required by the Sign Code for failing to obtain the appropriate permit prior to installing the sign.
3. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.

RUANE Item 3, Case No, BZA2004-23, Request a Variance to increase the permitted height and reduce the required setback for a billboard on property zoned “LI” Limited Industrial, generally located south of I-235 and west of West Street. Applicant, Bressler/Kelso Joint Venture, and Kansas and Oklahoma Railroad, Agent, Ferris Consulting, %Greg Ferris.

KNEBEL, Planning staff Presents staff report and slides. Staff recommends approval, subject to conditions, in the following staff report.

SECRETARY’S REPORT

CASE NUMBER:	BZA2004-00023
OWNER/APPLICANT:	Kansas and Oklahoma Railroad c/o Brad Snow (Owner); Bressler/Kelso Joint Venture c/o Pat Kelso (Applicant)
AGENT:	Greg Ferris (Agent); Mike Case (Attorney)
REQUEST:	Variances for a billboard to increase the permitted height from 50 feet to 71.3 feet and to eliminate the front and west side setback requirements
CURRENT ZONING:	“LI” Limited Industrial
SITE SIZE:	0.05 Acres

LOCATION: South of I-235 and west of West Street

JURISTITION: The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five conditions, as required by State Statutes, are found to exist.

BACKGROUND: On March 26, 2003, the Office Central Inspection issued the attached letter indicating that no sign permit was required to construct a billboard on the subject property, which is a portion of railroad right-of-way that is zoned “LI” Limited Industrial and is located south of I-235 and west of West Street. On June 17, 2003, the applicant sent the attached letter asking for confirmation that no sign permit was required, and on that same date, the Office of Central Inspection issued the attached letter confirming that no sign permit was required for the proposed billboard. The applicant subsequently constructed a billboard on the subject property. On September 5, 2003, the Office of Central inspection issued the attached letter indicating that previous correspondence regarding no sign permit being required was in error.

The billboard that was constructed on the subject property does not conform to the height and setback requirements of the Sign Code. Section 24.04.222.2. of the Sign Code limits the height of a billboard located adjacent to an elevated freeway to 14 feet above the top of the railing or barrier along the traffic deck. For the subject property, a billboard would be limited to 50 feet in height since the freeway railing is 36 feet in height. The billboard on the subject property is 71.3 feet in height, as illustrated on the attached sign elevation drawing; therefore, the applicant is seeking a variance to permit the increased height at which the billboard was constructed. Section 24.04.222.4. of the Sign Code requires billboards to meet all building setback requirements. For the subject property, a setback along the north property line of 20 feet is required, and a setback along the east and west property lines of either at least five feet or zero feet is required. The billboard is set back approximately two feet from both the north and west property lines, as illustrated on the attached site plan; therefore, the applicant is seeking a variance to permit the setbacks at which the billboard was constructed. The applicant submitted the attached letter dated March 22, 2004, that addresses how the request meets the criteria for granting the variances requested.

ADJACENT ZONING AND LAND USE:

NORTH	“LI“	Various industrial uses
SOUTH	“LI“	Various industrial uses
EAST	“LI“	Concrete plant
WEST	“MH“	Vacant

UNIQUENESS: It is the opinion of staff that this property is unique, inasmuch as the property would permit a billboard were it constructed in conformance with the height and setback requirements of the Sign Code; however, the applicant was informed twice by the Office of Central Inspection that a permit for the billboard was not required. Had a permit been required, the non-conformities in terms of height and setbacks could have been identified prior to construction, and the proposed billboard could have been constructed with a different height and setbacks.

ADJACENT PROPERTY: It is the opinion of staff that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as adjacent properties are used

primarily for industrial purposes and are located along an interstate freeway where billboards are common. The increased height and reduced setbacks for the billboard do not significantly increase the impacts of the billboard on adjacent properties.

HARDSHIP: It is the opinion of staff that the strict application of the provisions of the sign regulations will constitute an unnecessary hardship upon the applicant, inasmuch as the applicant relied upon an Office of Central Inspection interpretation that a permit was not required and constructed the billboard in good faith based on this written interpretation. Lowering the height and relocating the billboard outside the setbacks would entail significant expense to applicant in order to remedy an error by the Office of Central Inspection.

PUBLIC INTEREST: It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as the billboard is not significantly out of scale and the setback encroachments do not detrimentally impact uses or projects of public interest.

SPIRIT AND INTENT: It is the opinion of staff that the granting of the variance requested would not oppose the general spirit and intent of the Sign Code inasmuch as the billboard reasonably balances the need for the sign with the preservation of the visual qualities of the community.

RECOMMENDATION: Should the Board determine that conditions necessary to the granting of the variance exist, then it is the recommendation of the Secretary that the variances for a billboard to increase the permitted height from 50 feet to 71.3 feet and to eliminate the front and west side setback requirements be GRANTED subject to the billboard complying with all other regulations of the Sign Code.

RUANE How does this relate to the present moratorium?

KNEBEL It relates to it in the fact that there is a moratorium under consideration for billboards and this is a billboard. Other than that, I don't know the specific relationship between the two.

RUANE It is not in any manner the cause for the issue to be brought before the City Council?

KNEBEL You are asking the wrong person that question. I am not involved with Council decisions about those matters.

DICKGRAFE As far as the cause, I think there was a general concern about the number of billboards. I do not believe that this was the one that Councilperson Martz had the most problems with. My understanding is that since the moratorium is not actually effective yet, the BZA can proceed with this application and really shouldn't be concerned about the effects of the moratorium, and I know Kurt Schroeder has worked in more detail with this. I think the understanding is that if it was filed before the moratorium is in place we are to process them like we would any other application. Even if this variance is granted the applicant would still have to go ahead and get the next step, and that would be the actual sign permit itself.

RUANE If we grant the variances, it is just a formality to go through obtaining the sign permit isn't it?

DICKGRAFE Assuming that the billboard complies with all of the other provisions of the Sign Code.

RUANE The request for variance covers any of the variances from the Code sought?

DICKGRAFE I would assume so, yes.

FOSTER I was looking in the Unified Zoning Code and wondering what is the effect? In effect they have no permit, and they did ask the question and to their credit they asked it twice. Isn't there something about this very awkward, because I am under the impression that if a permit is given out it is automatically null and void if it is given out in error. In this case we have advice that has been given out in error, and I was wondering the same thing whether the community is protected from a mistake made in that sense. Also, have you ever had the experience before, and let's say that this was turned down, has the City been sued in regard to something of this nature where they were told that it didn't come under the regulations or not?

KNEBEL I personally am not aware of an instance where somebody was told that they do not have to comply with a regulation and then later told that there was a error made and that yes they do.

DICKGRAFE In relations to signs, I am not aware of any cases. Can lawsuits be brought? Sure, but the City would have some immunity under the Tort Claims Act assuming this was some sort of a tort that being the discretionary function or interpretation of the person involved. I guess to answer your void question, I think this is distinguishable from the point that the applicant tried to do what he needed to do but was told you don't need a permit, and if you don't need a permit, then what additional step are you wanting the applicant to take.

FOSTER It doesn't really give any rationale, either. The letters that were sent don't say why the thinking initially was that the sign regulations didn't apply to a railroad.

DICKGRAFE I think it was staff's opinion that because this was a railroad right-of-way and because railroads are regulated by the Federal government under the Interstate Commerce clause that we couldn't regulate the right-of-way, which is not true. We can have some regulations. We just can't interfere with the operation of the railroad, and I think they read that broadly.

RUANE So the present understanding is that a billboard is not engaged in Interstate Commerce?

DICKGRAFE I would think that would be an appropriate interpretation.

SCHROEDER This is a bad error on our staff's part, and when it came to my attention in August, when these were being erected, that was the first time I had heard about them. I said show me the legal opinion, and there wasn't any written.

RUANE So the signs were constructed in August during that time period or prior to the letter from the City to Bressler/Kelso saying you can't build the sign.

SCHROEDER They were being erected at that time.

FOSTER I am surprised this hasn't come up before. It seems like an obvious thing that could happen from time to time. It doesn't seem to me to be an unusual question in zoning about building on the railroad right-of-way.

SCHROEDER I haven't been asked the question personally, but to my knowledge there weren't any built in the railroad right-of-way around the City for many years. There might have been one or two in the County I have heard but I don't really know for sure.

FOSTER It is not unusual for a railroad to build on their own right-of-way. I presume they have to get a permit even though it is on their own right-of-way. They build loading and unloading stations and things like that. I just thought these would have come up.

DICKGRAFE I think we've run into the same type of issue on the State Interstate Highway right-of-ways. Do they have to comply with the Building Codes, and do they have to comply with the Sign Codes? I think the answer is yes they do. But it is the same kind of analysis that if you want to put a sign in the interstate right-of-way, if it is not a State sign but a private sign you would need to look at our Sign Code.

RUANE Are there any present billboards located in railroad right-of-way that face US-54 Kellogg, the flyover, downtown?

SCHROEDER Yes, one that I know of.

GREENLEE The one there at the airport, there at the airport entrance road Mid-Continent Drive, is in a railroad right-of-way also.

DICKGRAFE This one, one off Zoo Blvd, and one on Kellogg.

GREG FERRIS There are numerous signs in the right-of-way, whether or not those have permits I am not sure. It is not unique to build in the railroad right-of-way. We understand there were mistakes made. We went above and beyond to make sure that they didn't need a permit, and that they didn't have any regulation, based on the conversation and letters. This client wants to work with the City. This sign was not one of the signs that precipitated the moratorium. We are put in an unique situation, and we have met with staff, and we came to the conclusion to go through the BZA would be the most appropriate. The other sign meets the Sign Code but is on unzoned property that the railroad right-of-way is on, and we are zoning that property, and you should not have to visit that sign because they happen to be constructed within the Code. What we are here today is trying to do the right thing and do what staff has asked us. We believe this sign can be varied. We think we meet the criteria to grant the variance.

FOSTER Looking at the drawing what is that land to the southeast?

FERRIS It is a concrete/asphalt plant.

KNEBEL At the southwest is a recreational lake. It looks like a motorcycle trail and probably not a permitted used.

FOSTER Is there private land between the sign and the right-of-way of the interstate? Is that what Bolin means?

FERRIS Bolin is a frontage road that we are requesting the setback from.

FOSTER Is this an abandoned railroad?

FERRIS We had the permission right of the railroad. The railroad had granted a lease on that, but it is an active railroad. We could have moved it 15 feet had we known.

MIKE CASE, Attorney, 150 N. Main, Ste. 400, Wichita, KS 67201 I really don't have anything to add, and we are trying to get a resolution with staff that everybody can live with.

DAVID BRESSLER, BRESSLER/KELSO JOINT VENTURE, Winterpark, FL 32789 This is important to me and my partner. We did try to make application, and we did try to follow the rules. We are a couple of businessmen, and we were invited to come to Wichita to help the railroad to help determine some secondary opportunities for revenue. That track is active. It does haul grain. We are trying to determine cell towers, billboards or any other opportunities that might be on the property. When we came to Wichita we were excited. We develop real estate, residential/commercial, billboards, and cell towers and we even have a couple of radio stations.

FOSTER Have you had this experience before?

BRESSLER We have built in the railroad right-of-way before in other markets. We were surprised that the City said they don't regulate railroad right-of-way. The railroad invited us in to build 16 signs. We thought we had the right to build anywhere in the railroad. We built three, and we had the right to build 16 based upon that letter from the City. We thought the rest of the locations were in and around residential areas, and again, because we want to act responsibly as businessmen we chose not to build in those locations.

FOSTER Will you be planning to build others?

BRESSLER We hope too. We plan on doing other development in Wichita.

FOSTER Other City's do require a permit when it is in the railroad right-of-way?

BRESSLER Yes, most City's require a permit when it is within their City jurisdiction.

RUANE Kurt, I admire the support you show for your staff and saying that we made a mistake and taking the blame.

FOSTER I would note how open the area is around this and the fact that there are no residences around here, and I think people would expect to see signs in this area. I think the applicant is acting responsibly.

FOSTER MOVES GREENLEE SECONDS THAT THE BOARD ACCEPT THE FINDINGS OF FACT AS SET FORTH IN THE SECRETARY'S REPORT; AND THAT ALL FIVE CONDITIONS SET OUT IN SECTION 2.12.590(b) OF THE CITY CODE AS NECESSARY FOR THE GRANTING OF A VARIANCE HAVE BEEN FOUND TO EXIST AND THAT THE VARIANCE BE GRANTED SUBJECT TO THE CONDITIONS SET OUT THE SECRETARY'S REPORT.

FOSTER What if this sign blew down or anything happened to it, could it be replaced or not?

KNEBEL Yes, they could replace it and be reconstructed in its present form.

MOTION carries 4-0. The Board adopts the following resolution:

BZA RESOLUTION NO. 2004-00023

WHEREAS, Kansas and Oklahoma Railroad c/o Brad Snow (Owner); Bressler/Kelso Joint Venture c/o Pat Kelso (Applicant); Ferris Consulting, c/o Greg Ferris; Mike Case (Attorney); pursuant to Section 2.12.590.B, Code of the City of Wichita, request variances for a billboard to increase the permitted height from 50 feet to 71.3 feet and to eliminate the front and west side setback requirements on property zoned "LI" Limited Industrial legally described as follows:

A tract of land lying in the Northeast Quarter of Section 11, Township 28 South, Range 1 West of the 6th Principal Meridian, Sedgwick County, Kansas being more particularly described as follows: Commencing at the Southeast Corner of Lot 1, Block 1, Big Lake Addition, Wichita, Sedgwick County, Kansas; thence along the East line of said Lot 1 for a distance of 1232.86 feet to the Northeast corner of said Lot 1 to a point of beginning; thence North on said East line extended North for a distance of 8.00 feet to the intersection of the South line of Interstate 235 Highway right-of-way; thence Southeasterly along said Highway right-of-way for an arc length of 135.55 feet, a radius of 2112.04 feet, delta of 3 degrees 40'38" to the intersection of said Highway right-of-way and the right-of-way of the Missouri Pacific Railroad; thence South along the right-of-way line of the Missouri Pacific Railroad, said line being the West line of Mid Kansas Addition, Sedgwick County, Kansas, for a distance of 19.68 feet; thence West at right angles to said line for a distance of 100.00 feet to the East line of said Big Lake Addition; thence North along said East line to the point of beginning. Generally located south of I-235 and west of West Street.

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of April 27, 2004, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance arises from such condition which is unique. It is the opinion of the Board that this property is unique, inasmuch as the property would permit a billboard were it constructed in conformance with the height and setback requirements of the Sign Code; however, the applicant was informed twice by the Office of Central Inspection that a permit for the billboard was not required. Had a permit been required, the non-conformities in terms of height and setbacks could have been identified prior to construction, and the proposed billboard could have been constructed with a different height and setbacks.

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents. It is the opinion of the Board that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as adjacent properties are used primarily for industrial purposes and are located along an interstate freeway where billboards are common. The increased height and reduced setbacks for the billboard do not significantly increase the impacts of the billboard on adjacent properties.

WHEREAS, the Board of Zoning Appeals has found that the strict application of the provisions of the zoning ordinance of which variance is requested will constitute unnecessary hardship upon the property owners represented in the application. It is the opinion of the Board that the strict application of the provisions of the sign regulations will constitute an unnecessary hardship upon the applicant, inasmuch as the applicant relied upon an Office of Central Inspection interpretation that a permit was not required and constructed the billboard in good faith based on this written interpretation. Lowering the height and relocating the billboard outside the setbacks would entail significant expense to applicant in order to remedy an error by the Office of Central Inspection.

WHEREAS, the Board of Zoning Appeals has found that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare. It is the opinion of the Board that the requested variance would not adversely affect the public interest, inasmuch as the billboard is not significantly out of scale and the setback encroachments do not detrimentally impact uses or projects of public interest.

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinance. It is the opinion of the Board that the granting of the variance requested would not oppose the general spirit and intent of the Sign Code inasmuch as the billboard reasonably balances the need for the sign with the preservation of the visual qualities of the community.

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals, pursuant to Section 2.12.590.B, Code of the City of Wichita, that variances be granted for a billboard to increase the permitted height from 50 feet to 71.3 feet and to eliminate the front and west side setback requirements subject to the billboard complying with all other regulations of the Sign Code on property zoned "LI" Limited Industrial described as follows:

A tract of land lying in the Northeast Quarter of Section 11, Township 28 South, Range 1 West

of the 6th Principal Meridian, Sedgwick County, Kansas being more particularly described as follows: Commencing at the Southeast Corner of Lot 1, Block 1, Big Lake Addition, Wichita, Sedgwick County, Kansas; thence along the East line of said Lot 1 for a distance of 1232.86 feet to the Northeast corner of said Lot 1 to a point of beginning; thence North on said East line extended North for a distance of 8.00 feet to the intersection of the South line of Interstate 235 Highway right-of-way; thence Southeasterly along said Highway right-of-way for an arc length of 135.55 feet, a radius of 2112.04 feet, delta of 3 degrees 40'38" to the intersection of said Highway right-of-way and the right-of-way of the Missouri Pacific Railroad; thence South along the right-of-way line of the Missouri Pacific Railroad, said line being the West line of Mid Kansas Addition, Sedgwick County, Kansas, for a distance of 19.68 feet; thence West at right angles to said line for a distance of 100.00 feet to the East line of said Big Lake Addition; thence North along said East line to the point of beginning. Generally located south of I-235 and west of West Street.

ADOPTED AT WICHITA, KANSAS, this 27th DAY of APRIL, 2004.

HERB SHANER, OCI, I have no report at this time.

RUANE Item 5, Discussion of BZA Rules of Procedures requested by Bickley Foster.

FOSTER Mr. Ruane, you weren't here last time, and Mr. Skelton wasn't here. We only have four of our members here. I do think this is an important question, and I wonder if we should defer until we have more members or pursue with the members that are here today.

RUANE I am inclined to defer, but I would like to know what we need to review.

FOSTER I was prepared to address the idea of use variances and show how the regulations work in that regard. The second thing that I genuinely have a problem on trying to figure out how to abstain, because at one point it says a person who abstains continues to be a member of the quorum, and the next part it says that if you abstain you have to disqualify yourself and leave the bench, so I think there is some wording that needs to be reviewed and/or corrected. I would like Mr. Phillips to be here because he has been on the Board a long time.

RUANE I don't understand the idea to avoid what by use variances?

FOSTER You recall the Air Force base in which they wanted to put a restaurant in and a restaurant was not allowed and they withdrew and I can't remember if they withdrew it or whether we continued it.

DICKGRAFE The Board denied it.

FOSTER The issue in my mind was if you can have a use variance, and the same thing came up at the last meeting. I was still struggling with the idea the rules say that if you have a industrial use in that particular zone, such as a machine shop, that there had to be an office in the front, and in this case they didn't have one before and had no intention of wanting to build one now, and my point was that a use variances or a front yard setback problem.

RUANE Am I wrong in thinking that we don't presently have the authority to grant use variances?

FOSTER We have a State statute, and this is what it says, "Such variance shall not permit any use not permitted by the Zoning Regulations in such districts." We don't have that in our zoning regulations, and the question arises do we still come under that as a State statute? I presume that we do.

RUANE In the City is that gap between the State statute and our charge picked up by any other body?

FOSTER We don't know. It has happened twice now.

KNEBEL That section that Bickley is citing to on the State statute is not in the Unified Zoning Code it is in the City Code which establishes the procedures for hearing and granting variance request. It is in the City Code that authorizes the creation of the Board of Zoning Appeals and gives them their powers.

DICKGRAFE Let's defer this a month and let me provide a memo to the Board that I think will address some of Bickley's concerns, especially as to where staff and my office interpret the Code to allow us to do those two types of variances. This Board used to have use exceptions. That was taken away from us, and we were left with variances. Staff is of the opinion that we have a difference of interpretation as to whether or not what we are doing is a variance of the Code provision or whether it is more akin to the use exception, which I think Bickley is trying to say that we are actually changing a use which, in his opinion we don't have authority for.

RUANE I think Sharon you have already given us a memo that states if a Board member abstains they must physically remove themselves.

DICKGRAFE I think there is some confusion. Generally you can't just abstain because you don't want to vote on it. Generally you have a conflict, or you weren't present, or some reason, so I think there needs to be some clarification on if I don't agree with staff interpretation, or don't agree that this Board has authority to hear, that your proper remedy is probably not to abstain from voting, it is to vote that this Board doesn't have authority to do that.

RUANE Let's table Item 5 for next BZA meeting.

Meeting adjourned 3:00 p.m.